No. 20334

IN THE

United States Court of Appeals For the Ninth Circuit

J. A. Woodworth and B. D. Elliott,
Appellants,

v.

Tacoma Yacht Club,
Appellee.

Appeal from the United States District Court for the Western District of Washington, Southern Division

Honorable George H. Boldt, *Judge*

APPELLANTS' REPLY BRIEF

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ARGUMENT IN REPLY

Appellee's Status as a Non-Profit Private Club Does Not Affect Its Potential Tort Liability to Its Members

The appellee Yacht Club emphasizes its status as a private club organized as a non-profit corporation. The tenor and direct implication of its argument is that such status should be given some special consideration in determining liability. Without citation of authority, its brief invites the conclusion that a private Yacht Club is immunized from the principles of liability which other corporations must bear with relation to the negligence of their employees. However, the implication thus sug-

gested by the appellee's brief does not accord with the law.

It is clear in the law of the State of Washington that even a non-profit charitable corporation is as fully exposed to liability for its employees' negligence as any other corporation would be. *Friend v. Cove Methodist Church, Inc.*, 396 P.2d 546, 65 Wn.2d 165 (Sup. Ct. Wash., 1964). It necessarily follows that if a non-profit charitable corporation is fully liable in negligence even to its non-paying beneficiaries, the appellee Yacht Club is subject to the same generally applicable principles of law when its employees negligently damage the property of a member who pays for the use of its facilities.

Appellants would note that there is no public policy consideration whatsoever which favors incorporated non-profit clubs, and appellee cites no authority to that effect. Such organizations are liable to their members for any negligence causing damage to those members. Thus, as libelants do here, any member of a private, incorporated club has a clear right to recover from the club for its negligence. *Barnes v. Labor Hall Assoc.*, 319 P.2d 554, 51 Wn.2d 421, (Sup. Ct. Wash., 1958); also see 14 C.J.S. *Clubs*, Sec. 27. Although the appellee suggests a contrary standard, which is not specified with any particularity, the appellants submit that appellee's status as a private non-profit club in no way exonerates it from liability to its members and thus, the repeated allusions to this status are wholly irrelevant.

Strict Construction of Indemnity or Exculpatory Provisions

The appellee Yacht Club quotes from two cases, *Keystone* S. S. *Corp. v. Willamette Iron & Steel Co.*, 222 F. Supp. 320 (DC Ore., 1963) and *Chicago, M., St. P. & P. R. Co. v. Famous Brands, Inc.*, 324 F.2d 137 (8 Cir., 1963) to the effect that the rule of strict construction should not be applied to indemnity or exculpatory provisions, such as that raised here to shield it from liability for its own negligence. The initial brief of appellants cites sufficient authority to confirm that the principle of strict construction is applicable to such agreements. However, since the appellee quotes at length from the Washington case of *Griffiths v. Henry Broderick, Inc.*, 182 P.2d 18, 27 Wn.2d 901, 175 A.L.R. 1 (Sup. Ct. Wash., 1947), we should note that the Washington Supreme Court there stated:

> "° ° ° 'It is well settled that a contract of indemnity will not be construed to indemnify the indemnitee against losses resulting to him from his own negligent acts, where such intention is not expressed in unequivocal terms.'
>
> "There is no doubt but that this rule is well settled. But we think the author ° ° ° meant no more than that the rule in such situations is that doubts, if any, should be resolved in favor of the indemnitor. ° ° °"

In fact, strict construction of an indemnity provision such as is asked by appellants here was employed by the Washington court in its most recent opinion considering this point. *Feigenbaum v. Brink*, 66 Wn.2d 117 (Sup. Ct., Wash., 1965).

Appellants also would note that neither the *Keystone Steamship* nor the *Famous Brands* cases from which appellee quotes are pertinent to the present cause. *Keystone Steamship Corp. v. Willamette Iron & Steel Co.* does not involve a situation where a party raising an indemnity provision thereby seeks to relieve itself of its own negligence, and thus is basically distinguishable from the cases cited by appellants' initial brief, and from the present cause. Furthermore, the passage appellee quotes from *Famous Brands* is grossly out of context, a portion of the sentence being omitted (without indication of that omission in the appellee's brief). A full quotation, with the portion omitted by appellee now italicized, reads:

> "*The parties also agree that under Minnesota law* indemnity agreements should not be given 'an unduly liberal or harshly strict construction but a fair construction will accomplish its stated purpose.'"

Since the *Famous Brands* case does not purport to state a rule of construction applicable either to causes in Admiralty generally or operative under the precedents in the State of Washington, the quotation from it is wholly inappropriate.

Applicability of the Exculpatory Language

The appellee sets forth (Appellee's Brief, pps. 11 and 12) four separate provisions excerpted from the language of its Membership Application (Ex. D) and from its Application for Moorage (Ex. E).

Appellants' initial brief states authority supporting the rule that a tort feasor may only shield itself from liability

to an injured party by contract if the contract language expressly indicates in clear and unequivocal terms that it is intended to accomplish that end. In reviewing the three provisions excerpted by the appellee from its Application for Moorage form, and by review of that form itself (Ex. E) it is apparent that none of these provisions constitutes an indemnity or exculpatory agreement. Thus, only the single provision extracted from the reverse side of the Membership Application form (Ex. D) could even purport to be a hold-harmless or indemnity agreement. It is that provision which is principally discussed by appellants' initial brief.

This single pertinent clause from the Membership Application is to the effect that the member agrees to hold the appellee Yacht Club harmless "in the event of damage and/or loss of any kind or description whatsoever to my boat or other equipment while the same is moored and/or located upon the premises of the said Yacht Club * * *." In this regard the appellants submit, first that the hold harmless provision is not adequate or sufficient in its wording to constitute a "clear and unequivocal" undertaking to relieve the Yacht Club of liability for the consequences of its own negligence causing damage to a member's property, and secondly, that even if it were by its own terms, this provision does not extend to the loss suffered by the appellants which did not occur on the premises of the Yacht Club.

The appellee Yacht Club's argument that the language or the proffered application form provision saves it from

liability for its own negligence, principally relies upon the opinion of the Washington State Supreme Court in *Griffiths v. Broderick, Inc., supra.* The provision considered in *Griffiths v. Broderick, Inc.* expressly exonerated the indemnitee from "all loss, damage or injury to any person or persons whomsoever, or property, *arising from any cause or for any reason whatsoever* in or about said premises * * *." The Washington Court held that this language sufficiently conveyed the intention of the parties to relieve the indemnitor of liability for its own negligence. The provision advanced by appellee omits the phrase "arising from any cause or for any reason whatsoever." Appellants submit that this difference in the *Broderick* provision and the appellee's form is substantial in that the phrase omitted from the present agreement makes it impossible of being fairly interpreted as relieving appellee from the effects of its own negligence.

However, accepting the appellee's contention that the proffered provision of its Membership Application form is sufficient to exonerate it from the effects of its own negligence, and appellants certainly do not concede that point, it is abundantly clear that the "damage and/or loss" suffered by appellants did not occur on the premises of the Yacht Club.

The appellee cannot deny that the damage to the appellants' cabin cruisers, and the loss of their boathouse occurred on the open waters of Puget Sound several miles from the basin in which the appellee Yacht Club is situated.

While the appellee alludes to a "fundamental principle of law" that the place of the wrong is the situs of a tort action, we cannot perceive its relevancy to the provision in question which extends only to "damage" which occurs "on the premises." The damage in this instance plainly did not occur on the appellee's premises (without regard to where the situs of a tort action might be located). Furthermore, appellee misconstrues the rule of law as to the situs of a maritime tort resulting in loss or damage on navigable waters. Where a tort originates at waterside or on land but the ultimate injury occurs on navigable waters, the situs of the tort is not at the place of the original wrongful act, but is on those navigable waters, at the place where the damage occurs. *The America,* 34 F. Sup. 855 (ED NY, 1940). To the same effect see *Smith v. Lampe,* 64 F.2d 201 (6 Cir., 1933) and *The S.S. Samovar,* 72 F. Sup. 574, 1947 A.M.C. 1046 (N.D. Cal., 1947).

Even more fundamentally in making its argument, the appellee ignores a most pertinent rule of law recently announced by the Washington State Supreme Court in *Feigenbaum v. Brink, supra,* (1965). Although appellants have quoted this passage earlier we have taken the liberty of repeating it in this context:

> "In the absence of unequivocal language, the nonliability provision of a contract will not be extended to include areas not specifically described. ° ° °"

Appellee's Liability as a Bailee

Because the appellee again suggests that its relation-

ship to the appellants, that of a non-profit incorporated private club to two of its members, is somehow inconsistent with its being charged with the duties of a bailee for hire under the facts of this cause, the appellants would once again note the reasoning of the Supreme Court of the State of Louisiana in *Lewallen v. Board of Levee Commissioners of Orleans L. Dist.*, 166 So.2d (La. App., 1964) and of the Washington State Supreme Court in *Spare v. Belroy Housing Corp.*, 179 Wash. 385, 38 P.2d 207 (1937). Both of these cases, which we have cited earlier, indicate that one who would ordinarily stand as a lessor or renter of space in which another intends to keep his property, will become the bailee of that property when he undertakes to move it to a different location of his own choosing. The lessor of space in this manner cloaks himself with the duties of a bailee for hire. We also submit that it is clear that an incorporated non-profit private club taking possession of a member's property without specific charge therefor, but charging dues to the member for its services in general, becomes the bailee for hire of that member's property. *Greer v. Los Angeles Athletic Club*, 258 Pac. 155, 84 Cal. App. 272 (Cal. App., 1927).

At page 17 of its brief, appellee quotes language from its Moorage Application in which the Yacht Club is exempted from any liability for damage to member's property should it be damaged while being moved in case of "emergency or disaster." There is no evidence of any emergency or disaster threatening appellants' property, nor was such a contention even advanced by

the appellee in the Pre-Trial Order which delineated the issues to be heard by the District Court. This provision by its own terms is inapplicable to the incident in question and irrelevant to this appeal. Appellants can only conclude that by raising it the appellee is merely attempting to obfuscate the issues.

Appellee's only further argument to the appellants' assignments of error related to the theories of bailment and conversion, is that the court was in error in failing to find the appellants contributorily negligent. Principally the appellee contends that its publication *Lubberline* (the pertinent copy appears as Exhibit C) was notice to appellants that their boathouse and cruisers would be moved. It is clear that the notation in that issue of the Club bulletin was the only effort made to notify appellants of the movement (Tr. 16, 17). The inadequacy of that notice is patent; it merely indicates that "about 15 pilings" would be replaced "from the George Thompson Boathouse Northwest (toward the entrance to the basin)"; and that it "probably" would "be necessary to move many of the boathouses affected by this project." Clearly the notice did not state which boathouses would be moved, when they might be moved, for what duration, nor where they would be temporarily located. The District Court's conclusion that there was no actual or implied notice to the appellants of the movement of their boathouse is amply supported by the record.

While the appellee correctly states that appellant Woodworth did observe the manner in which the boat-

house was moored following its movement by the appellee's employees, it incorrectly infers that this fact rendered him contributorily negligent. The District Court in its oral opinion stated in this regard:

> "In my judgment, Woodworth at that time, a new-to-boating landlubber and not particularly acquainted with the vagaries of weather, wind, and sea as relating to boating and boat mooring, in an offhand way inquired of Mojean if he thought the tie-up was adequate, and Mojean saying that he thought it was, in no way whatever would preclude Woodworth from relying on the assumption that the respondent's employees, long-experienced in mooring vessels in this very area, had not done it properly and securely despite the doubt arising from this casual glance of the tie-up."

The validity of this conclusion of the District Court is imperative upon the evidence (Tr. 45, 46, 65).

The further suggestion of the appellee that notice to appellant Woodworth of the manner in which the boathouse was moored constituted an implied notice to appellant Elliott under a concept of the law of partnership, is wholly specious. As authority for that principle, the appellee cites two sections from the partnership statute of this state indicating that knowledge to one partner will be imputed to another. However, these statutory provisions expressly apply only to commercial partnerships and have utterly no application to the relationship between the appellants, which is that of coowners of a boathouse in which each keeps his own yacht. This limitation of the statutory provisions regarding partnerships cited by the appellee is clearly indicated

by reference to the portion of the statute introducing the sections appellee cites:

> "Nature of a partnership, RCW 25.04.060. Partnership defined: (1) A partnership is an association of two or more persons *to carry on as co-owners a business for profit.*"

The appellants submit that the appellee is clearly liable both under theories of bailment and of conversion, and that no matter which of these views is taken, the appellee cannot escape liability through the proffered exculpatory language of its membership application form. Furthermore the appellants submit that the appellee's assertion that the appellants had adequate notice that their boathouse would be moved to an alternate location by the appellee's employees, and that the appellants were contributorily negligent in not seeing that the boathouse was moored in a more adequate fashion than was accomplished by the appellee, is without support on the record, and that the District Court's findings in these regards is without error.

CONCLUSION

Without indulging in a lengthy restatement of the points already reviewed by appellants' initial brief, it again is submitted:

(a) That the exculpatory language of the appellants' Moorage Application and Membership Application is insufficient to permit it to escape the effects of its own negligence;

(b) That even if it were a sufficient disclaimer of

negligence under proper construction, it expressly does not apply to the facts of the instant loss, and

(c) That as a matter of law, these exculpatory provisions under concepts of bailment or of conversion, should not be applied to bar appellants' recovery.

Respectfully submitted,

LANE, POWELL, MOSS & MILLER
RICHARD F. ALLEN
Proctors for Appellants

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

RICHARD F. ALLEN
of Proctors for Appellants